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Giles H. Florence v. S.N.L. Financial Corporation and George Quist : Reply Brief

Utah Court of Appeals

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900533CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

GILES H. FLORENCE,

Plaintiff/Appellant,

vs.

S.N.L. FINANCIAL CORPORATION,
and GEORGE QUIST,

Defendants/Appellees.

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Case No. 900533-CA

Priority Classification
No. 16

REPLY BRIEF OF APPELLANT

Appeal From Order of Summary Judgment Entered By
Third Judicial District Court
Honorable Homer F. Wilkinson, District Court Judge Presiding

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FILED

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Mary T Noonan
Clerk of the Court
Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

GILES H. FLORENCE,	:	
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Plaintiff/Appellant,	:	
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SUMMARY OF ARGUMENTS

POINT I.

Appellees are not permitted to raise for the first time on appeal determinative issues of law which were not presented to the lower court or relied upon as an initial defense. Appellees herein have asserted in their brief on appeal for the first time that Sections 61-2-2(8) and 61-2-18 U.C.A. 1953 (as amended) are determinative of the issues on appeal. The former relates to the definition of a "real estate", and the latter to an affirmative defense which the appellee has not previously asserted. Those statutes are not determinative of any issue raised by the appeal, and do not relate to any factual or legal matters presented in the lower court. Those arguments raised for the first time on appeal should accordingly be disregarded as untimely.

POINT II.

Although the trial court did not specifically state in its bench ruling that the April 22, 1983 letter agreement was "ambiguous", the lower court did indicate that certain critical portions of the agreement were illegible and that the meaning was unclear. Under Utah law, a contract is considered to be "ambiguous" where, because of uncertain meaning of terms, missing terms, or other facial deficiencies, its meaning is unclear.

The lower court determined the wording of the April 22, 1983, letter agreement was insufficient to satisfy the "requirements of a brokerage agreement" or the "Statute of Frauds"; since it did not "spell out" anything as far as the terms; and it is appellant's position that parol evidence is admissible to explain the parties' intent and thereby the meaning of the agreement. The Statute of Frauds does not require that the "note or memorandum" be clear or unambiguous, but only that it exist. For the trial court to conclude as it did that the written agreement did not constitute a brokerage agreement or satisfy the Statute of Frauds because its meaning was unclear to the court is manifest error.

POINT III.

Under general contract principles, where fulfillment of a contract is dependant upon the act or consent of a third person which is not forthcoming, the contract cannot be enforced. Appellant asserts that approval by a third person of the parties' later agreement of May 31, 1984 was in fact an unsatisfied condition precedent to that agreement, and that failure to satisfy the condition renders the agreement unenforceable by either party. Since there existed at the time of the unenforceable May 31, 1984, agreement a prior commission agreement, it is his position that appellant became entitled to the payment of a commission upon performance, which was complete. The lower court erroneously

failed to consider available evidence of the parties' intent in connection with either the earlier or the later agreement. Such evidence, if considered, would have made their meaning clear.

ARGUMENT

POINT I.

MATTERS NOT PRESENTED TO THE TRIAL COURT MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL

It is well settled that matters which are not raised in the lower court may not be presented for the first time on appeal. Progressive Acquisition v. Lytle, ___ P.2d ___, 154 Utah Adv. Rep. 31 (Utah App. 1991)(citing Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983); James v. Preston, 746 P.2d 799 (Utah App. 1987)).

Appellees have raised for the first time in their responsive brief arguments under Sections 61-2-2(8) and 61-2-18, Utah Code Annotated, (1953, as amended) claiming that the provisions of those statutes are determinative. Since appellees have not previously raised those issues in the lower court, under Utah law they are now untimely.

Appellees' argument under sections 61-2-2(8) and 61-2-18 appears to raise a new affirmative defense, which is essentially that if appellant is to be considered a real estate broker then he

is estopped from maintaining an action for recovery of a commission. Appellees' other new argument is that appellant is not a proper party to this action; a defense which was not raised or ruled upon previously. Appellees are precluded by Utah law from raising either of those arguments at this stage of the proceedings. Appellees' requested interpretation of the cited statutes, which may or may not have been found meritorious below, is beyond the scope of this appeal, and should not be considered in deciding upon the propriety of the lower court's action.

POINT II.

THE LOWER COURT CONSIDERED THE APRIL 22, 1983 LETTER TO BE UNCLEAR AND UNINTELLIGIBLE

Appellees argue that the lower court did not find as a matter of law that ambiguity existed in the April 22, 1983, letter agreement; but found only that it was insufficient as a brokerage agreement to satisfy the Statute of Frauds since the "essential terms" for the payment of a commission were missing. Although the lower court did not specifically state in its bench ruling that it found the agreement to be "ambiguous", there is no other or better meaning to be derived from the court's observations regarding its attempts to read and understand the language of the agreement.

This court has previously held that "[O]nly when contract terms are complete, clear, and unambiguous can they be interpreted

by the judge on a motion for summary judgment. Colonial Leasing v. Larson Bros. Const., 731 P.2d 483 (Utah 1986)(citing Morris v. Mountain States Telephone and Telegraph Co., 658 P.2d 1199, 1201 (Utah 1983)). If the evidence concerning the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement is a matter to be determined by a jury. Colonial Leasing at 488 (emphasis added).

Appellees argue that the trial court correctly determined that the April 22, 1983, letter agreement was insufficient since the "essential terms" for the payment of a commission were missing. Appellant maintains that since the trial court determined that certain "essential" terms were unclear and unintelligible, the agreement must therefore be considered as "ambiguous" to that extent; thereby requiring resort to extrinsic or parol evidence to determine the parties' intent, and precluding summary judgment.

Appellees would have this court to conclude as a matter of law that if a written contract is presented to a court for interpretation and the court cannot read or understand the content thereof because it is illegible, incomplete, or poorly written, both parties are precluded from enforcing the contract regardless what their intent may have been. Such a result would conceivably encourage contract draftsmen to prepare unclear or poorly written documents with a view to later avoidance of enforceability.

The language of a written document is considered to be ambiguous if the words used may be understood to support two or more plausible meanings. Whitehouse v. Whitehouse, 131 Utah Adv. Rep. 28, 31 (Ct.App. 1990). The Utah Supreme Court in Faulkner v. Farnsworth, 665 P.2d 1292 (Utah 1983) held that when a contract is ambiguous because of "uncertain meaning of terms, missing terms, or other facial deficiencies", parol evidence is admissible to explain the parties' intent.¹ The facts of this case appear to fall squarely within the Faulkner holding, since according to the trial court's bench ruling, this contract leaves the court uncertain as to the meaning of its terms, has missing terms, and several other facial deficiencies. The agreement in this case must therefore be considered "ambiguous".

The trial court's bench ruling in this case clearly illustrates its inability to comprehend the parties' intent from the language of the April 22, 1983, letter agreement. Whether an ambiguity exists is a question of law to be decided before parol evidence may be admitted, and the trial court's bench ruling can only be read as recognizing ambiguity. As this court stated in Big Butte Ranch, Inc. v. Holm, 570 P.2d 690, 691 (Utah 1977):

[T]he court should first examine the language of the instruments and accord to it the weight and effect which

¹ Grow v. Marwick Development, Inc., 621 P.2d 1249 (Utah 1980).

it may show was intended and if the meaning is ambiguous or uncertain then consider parol evidence of the parties' intentions.

Of course, a motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended. (Emphasis added) Id. at 691.

The trial court's comments in its bench ruling clearly demonstrates the ambiguity. They include the following:

And of course as I was able to read it myself, which I could not make it all out. (Record at 00107, page 4) (emphasis added)

I am not persuaded that either the wording in paragraph 6 or the wording in the Form A is sufficient of a brokerage agreement to satisfy that a commission would be paid upon the broker finding a willing and able buyer. I don't think it's sufficient writing to meet that requirement and must be in writing under the Statute of Frauds. That it does not spell out anything really as far as the terms. (Record at 00107, page 4) (emphasis added)

I am of the opinion that the wording in the April 22nd letter and the Form A is not sufficient to spell out that anything was going to be paid regardless of what took place. I think the parties came down to it, that they did negotiate, and there may have been some misunderstanding as far as what was supposed to be paid by [sic] Mr. Florence. (Record at 00107, page 5) (emphasis added)

I don't think the letter of April 22nd or anything in Form A says [sic] the requirement of the law of the Statute of Frauds or the requirement as far as what must be in writing for a brokerage. (Record at 00107, page 5)

The trial court by its comments made a legal conclusion that the contract's meaning was by its terms "ambiguous" or "uncertain",

since the document itself presented "uncertain meaning of terms, missing terms, or other facial deficiencies". Any one of those conclusions would legally preclude summary judgment; yet the trial court ironically granted summary judgment because of the uncertainties and without any attempt to resolve them by considering available extrinsic evidence or allowing the factual issue to be decided by a jury.

An ambiguity obviously exists in paragraph six (6) of the April 22, 1983, agreement pertaining to the \$200,000.00 annuity, which was not a part of the purchase price and could have no other purpose than as a commission. The trial court correctly observed that "this was a critical situation", but followed that observation with a comment that the court "could not make it all out." (Record at 00107 pp. 4-5) In other words, understanding the meaning of paragraph 6 was considered critical to understanding the object of the \$200,000 annuity, but the critical paragraph of the agreement was illegible. Standing alone, paragraph six (6) of the agreement has no apparent meaning; yet it must mean something or the parties would not have written it into their agreement. The trial court erroneously made no effort to determine what it meant, and available extrinsic evidence clearly discloses its meaning.

POINT III.

UNDER CONTRACT LAW, FAILURE TO PERFORM A
CONDITION PRECEDENT RENDERS CONTRACT UNENFORCEABLE

Appellees argue in Point II of their response that failure to satisfy the third-party approval condition precedent contained in the May 31, 1984, letter release had no bearing upon the transaction contemplated between the parties. Appellees have provided no authority to support their argument that failure to obtain third party approval as a condition precedent to an agreement does not effect its validity.

The law of contracts is well settled regarding such conditions precedent and the necessity of satisfying them before the agreement becomes enforceable.² The Restatement of Contracts (Second) Section 225 states the general rule as follows:

Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur. (Emphasis added)

The second paragraph of the May 31, 1984 agreement specifically creates a condition precedent to the entire May 31, 1984 agreement, which it is undisputed never occurred. Again, that paragraph provides:

² 17 Am. Jur.2d Contracts, Section 320 et.seq (1964).

"This agreement is subject to approval of Mr. Joseph Henroid of the law firm of Nielson and Senior of Salt Lake City, Utah, particularly in regard to that certain court order of approximately October 1983 regarding the divorce of Giles H. and Ululani Florence." (Emphasis added)

Appellees argue that there was no necessity for any action by Mr. Henroid because the underlying transaction itself never closed. The obvious flaw in that position is that the approval did not relate to the closing, but to the agreement as a whole. The requirement was for approval of the entire agreement, unrelated to the closing. Both the approval of Mr. Henroid and failure of the closing were of course events beyond the control of appellant.

The basic objective in construing any contract must be to give effect to the intentions of the parties. If possible, those intentions must be determined from an examination of the text of the agreements. Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225, 229 (Utah 1987); DuBois v. Nye, 584 P.2d 823 (Utah 1978); Oberhansly v. Earle, 572 P.2d 1384 (Utah 1977). It is apparent in this case that the trial court failed to view the two written documents as a whole, or harmonize them if possible. Upon finding that uncertainties existed, the trial court failed to consider available evidence of the parties' intent outside the four corners of the ambiguous April 22, 1983 agreement; and without the benefit of such available illumination held the agreement to be unenforceable. The

trial court then suggested that if there were an enforceable brokerage agreement the May 31, 1984 release agreement would apply, erroneously failing to recognize the significance of a failed condition precedent to that later agreement. In both respects, the lower court erred.

It is apparent from viewing both agreements as a whole that there was a commission to be paid appellant. What remain unclear are the details of the parties' intentions. It is illogical that the appellant would agree to reduce his commission unless he was motivated by appellees' assurances that the transaction would proceed to a closing. If the appellees' position were to be accepted by this court, the result would be to reward a party who unjustifiably fails to close after full performance by another. As was noted by this court in Atlas Corp. v. Clovis Nat. Bank, at 230 (Utah 1987), **"such a holding would encourage fraudulent activity"**. Such conduct toward brokers who are lured into subsequent agreements assuring payment upon closing which the obligated party secretly intends not to conclude would be tantamount to fraud, and certainly contrary to public policy. The trial court has totally failed to consider the parties' intent in entering into the agreements, and that failure constitutes reversible error.


CONCLUSION

Appellees argue that the undisputed facts demonstrate that Appellant is not entitled to prevail on this appeal. Appellees' argument fails for the obvious reason that the trial court did not consider either the undisputed facts, or any of the facts which remain in dispute. The trial court determined that the April 22, 1983, letter agreement was unclear because the document was not legible and lacked certain clarifying terms, while failing to consider available parol evidence of the parties' intent. If the court had properly considered that evidence and attempted to harmonize both agreements as a whole, it would have been compelled to recognize the existence of an enforceable agreement, or at the very least, genuine issues of material fact precluding summary judgment. The uncertainties described in the trial court's bench ruling are, in and of themselves, sufficient to preclude summary judgment.

The intent of the parties is a matter for the fact finder to consider, and is not a question of law. The gravamen of this appeal involves public policy which should be to protect not only brokers but others who have fully performed under agreements entitling them to compensation from loss through the unscrupulous actions of a buyer who inexcusably refuses to perform. Appellant respectfully submits that the trial court's action be

reversed, and the case remanded for further proceedings as required by Utah law.

RESPECTFULLY SUBMITTED this 21 day of June, 1991.



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CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the foregoing APPELLANT'S BRIEF this 21 day of June, 1991, to the following:

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